80-1302

No.

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EARL DAVID SHAFFER,

Petitioner,

vs.

DAVID M. COOK, Oklahoma County District Judge, LARRY D. LAHMAN, and STEPHEN JONES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION BY UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

EARL DAVID SHAFFER, *Petitioner*
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QUESTIONS FOR REVIEW

The record of this case reflects numerous Judicial acts of prejudice, abuse of discretion, and dishonest intent by Judge DAVID M. COOK. The other respondents aided in these corrupt and conspiratorial acts. This being the case —, there were several basic laws violated and disregarded by the courts below with the main question briefly stated as follows:

1. Does the Constitution provide this petitioner the right to a fair and impartial trial?

2. Was Judge DAVID M. COOK disqualified by reason of having prejudice? Was he disqualified by fact and law?

3. The Oklahoma Case law states that when the records "create doubts as to the trial judge's freedom from prejudice" that he is "disqualified", and "was without judicial power or authority to make an order..." When this judge refused to disqualify himself did he usurp jurisdiction not granted by law and in obvious violation of his oath and the Constitution?

4. The United States Court of Appeals, Tenth Circuit decision dishonestly states "No allegation of the complaint indicates that appellee, Judge Cook, acted outside the scope of the jurisdiction of his Court." This petitioner's complaint has several allegations stating the corrupt abuses by respondent Cook in his Court. Part of petitioner's allegations states "DAVID M. COOK was without judicial power or authority and did not have jurisdiction to proceed in said case. That a basic part of his duty is to be in fact fair and impartial. That it was his duty to disqualify himself and he should have disqualified himself because of his bias and prejudiced attitude, but totally refused when requested by plaintiff. That he proceeded and continued to conspire against plaintiff when he knew he had no jurisdiction to make decisions due to his bias and prejudice." Does petitioner's complaint contain allegations and a basis for relief?

5. Did Judge DAVID M. COOK wilfully abuse his power and office in an unlawful manner by disregarding numerous laws —, allowing false entry into the record as to conspiracy, and usurping jurisdiction in a manner not created by and in violation of the law?

6. Will this petitioner be denied his right to equal protection and due process of the Constitution and Oklahoma Case law relating to bias and prejudice which disqualified Judge DAVID M. COOK from having jurisdiction?

7. The Case law cited in item 6 below describes the spirit and intent that Judge DAVID M. COOK had no jurisdiction and "ceased to be a judge" and for such "corrupt motives"... "can not afford him any protection." Further, "if the court had no jurisdiction of the case and the judge who was presiding knew of the facts, he is liable in this action." Does this United States Supreme Court intend to enforce the Constitution and the spirit and intent of the Case law against such an obviously corrupt, unlawful, and wilful abuse of a court by the respondents? Therefore, to also enforce that respondents are liable for their unlawful acts?

8. Does this United States Supreme Court intend to enforce the Constitution or become another Court which is a party to the unlawful protection and cover-up of corrupt and dishonest lawyers and judges?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

EARL DAVID SHAFFER,

Petitioner,

vs.

DAVID M. COOK, Oklahoma County District Judge, LARRY D. LAHMAN, and STEPHEN JONES,

Respondents.

Petitioner hereby prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals, Tenth Circuit, decision which carte blanche violates the Constitution, and laws as set forth herein. To review and remand that respondents have violated the law and should be tried by a jury as to their conspiracy and unlawful acts being questions of fact.

OPINION BELOW

This case was assigned to Number 79-2201 by the Tenth Circuit Court of Appeals. This case has not been assigned a citation.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254. That specifically the United States Constitutional provisions of fair and impartial trial, equal protection and due process clauses, and numerous other laws were violated and should be enforced by redress. The Tenth Circuit decision was dated November 5, 1980.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. STATE ex rel LARCEY v. SULLIVAN et al, 207 OK 1.128, 248 P.2d 239, 240, 244, at Page 240:

Syllabus by the Court

1. Every litigant is entitled to nothing less than the cold neutrality of an impartial judge.
2. It is the duty of courts to scrupulously guard the right of a litigant to impartiality of a judge and a judge should refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question.
4. *Record examined and held sufficient to create doubts as to to the trial judge's freedom from prejudice against relator,* notwithstanding the fact that he believes himself to be unprejudiced, and held further that record discloses that *the trial judge was, under the circumstances, disqualified to preside as a judge in the case and by reason thereof, was without judicial power or authority to make an order* appointing a receiver over all the property of the petitioner (defendant) or to order the payment of an additional sum of $500 for plaintiff's attorney fee, or to perform any further judicial functions in the cause except to certify his disqualification to further preside in the case.

Page 244:

"2. In Heard v. Sullivan, Judge, supra, we said that where there are circumstances of such a nature as to cause doubts as to a judge's partiality, bias or prejudice, it is his duty to disqualify, notwithstanding the fact that he personally believes himself to be unprejudiced, unbiased and impartial."

2. BLEVINS v. MORLEDGE et al, 5 Okl. 141, 47 P.1068 at 1069 states:

"Authority to hear and determine a cause is constantly interpreted as the equivalent of jurisdiction."

3. STATE ex rel. BINGHAM v. HOME BREWING CO. OF INDIANAPOLIS, 105 N.E. 909 at 917 states:

"Authority" means control over, jurisdiction, absolute power."

4. HEARN et al v. MILLER, District Judge, Oklahoma Case Cite, 33 P.2d 506 and 507:

Syllabus by the Court

2. Statements made by a judge concerning one who is then or thereafter becomes a party to an action in his court which statements are made at great length and in detail and indicate deep feeling of bias or prejudice, are sufficient to disqualify the judge to sit and preside over the trial of a cause in which such person is a party.

at 507

"yet the question is not so much whether he feels and insists that he would be able to give a fair and impartial trial, as *it is to whether his utterances and actions have been such as to preclude reasonable men from feeling that a fair and impartial trial, without bias or prejudice, could be had before him.*"

Further, at 507 states:

"a judge who has theretofore in an extended public statement made such forceful criticism of the party as to indicate a sincere bias or deep-seated prejudice. Where this has been done the judge should not in justice to the litigant sit in the trial of his case." London v. Ogden, supra.

5. TEGLER v. STATE, Oklahoma Case Cite 130 P. 1164 at 1167:

"The words "prejudice" and "impartial" have no narrow, technical meaning in a legal sense, but are words commonly used in the everyday affairs of life, and their meaning is well understood by all persons of ordinary intelligence. Webster's New International Dictionary defines "Prejudice" as "an opinion or judgment formed beforehand, or *without due examination; a prejudgment.*"

"Prejudice" is prepossession; judgment formed beforehand without examination."

6. BRADLEY v. FISHER, 13 Wall. 335, 20 L. Ed. 646 (1872) at 647 states:

Second. *If the court had no jurisdiction of the case, and the judge who was presiding knew of the facts, he is liable in this action,* although he did not act corruptly or maliciously. Houlden v. Smith. 14 Q.B. 841.

Harvie v. Cammack, 6 Dana, 243. *"It must not be arbitrary, vague and fanciful."* Rex v. Wilkes, 4 Burr. 2539; Witman v. Ely, 4 Serg & R 265.

"If this discretion be wilfully abused, it is criminal." Rex v. Young, 1 Burr. 563.

"A judge or any person acting by authority as such, where he has over the subject matter and over the person, a general jurisdiction which he has not exceeded, will not be liable to have his judgment examined in an action brought against him, but *if the jurisdiction be wanting over the subject matter and over the person, such judgment would be examinable."*

at 648 states:

"before the court can acquire jurisdiction to adjudicate; and that *jurisdiction is limited to the exercise of a legal discretion by a court, and does not include the arbitrary acts of a judge.*

"The question in every case to be determined is, *was the act done a judicial act, done within his jurisdiction?* If it was not, he can claim no immunity or exemption by virtue of his office from liability as a trespasser; "for if he has acted without jurisdiction, he has ceased to be a judge." See Randell v. Brigham, 7 Wall. 523, 19 L. ed. 285.

"But if, *from malicious and corrupt motives, he usurped jurisdiction knowingly, the fact that he claimed to be acting as a court, and acted erroneously cannot afford him protection."* Yates v. Lansing, 9 Johns 407-413, 432.

"3. *Wilful abuse of power, corrupt exercise of office, express malice towards an individual and working intentional injury to him by means of false entries made by a judge on the records of a court of general jurisdiction, are not judicial*

acts and are not within the discretion of the judge; and satisfactory proof of these facts is admissible in evidence in actions to usurp the wrong done by such acts; to show that, in the particular case, *the judge attempted to create for himself a jurisdiction and discretion not given by the law."*

at 651 states:

"A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Where there is clearly no jurisdiction over 352*) *the subject matter, any authority exercised is usurped authority, and for the exercise of such authority, *when the want of jurisdiction is known to the judge, no excuse is permissible."*

7. 72 C.J.S. 480, 481 states in part:

PREJUDICE:

"....formed without proper grounds or before suitable knowledge; an opinion or judgment formed beforehand, or without due examination;..."

"..."Prejudice" also means to the injury or detriment of another; but it is only detriment resulting from unfair judgment which constitutes legal prejudice."

"As a verb, the word "prejudice" is defined as meaning to injure or damage by some judgment or action; to cause injury to; hence, generally to hurt; damage; injure, impair; to cause any harm or damage or loss to; to bias the mind by hasty and incorrect notions, and *give it an unreasonable bent to one side or other of a cause;* to prepossess with unexamined opinions, or opinions formed without due knowledge of the facts and circumstances attending the question."

"Prejudice: as a noun has been held synonymous with "Prejudgment" see ante note 50, and has been distinguished from "bias" see 10 C.J.S. p.354 note 72; and *as a verb has been held substantially similar to "defraud"* see 26 C.J.S. p.683 note 12.1."

"In law, prejudice is a bias on the part of the judge, jury, or witness, which interferes with fairness of judgment."

STATEMENT OF CASE

This petitioner originally filed a civil lawsuit for Legal Malpractice and Conspiracy against the one respondent named herein Stephen Jones. This case was filed in the Oklahoma County District Court on October 26, 1976. This original case was assigned the Number CJ-76-3316. The respondent DAVID M. COOK was assigned this case CJ-76-3316 as a District Judge. The remaining respondent LARRY D. LAHMAN was an attorney representing the defendant Stephen Jones in Case CJ-76-3316. This case came for hearing on several occasions before respondent DAVID M. COOK.

This petitioner was unable to find an attorney to represent him in the aforesaid case. He therefore appeared Pro Se before DAVID M. COOK each and every occasion his interests were represented.

That these appearances before Judge DAVID M. COOK subjected this petitioner to numerous prejudicial and unlawful acts of conduct that were intentional intimidation of petitioner. Respondent Judge DAVID M. COOK maintained a complete attitude that is exemplified by the following statement which he directed to this petitioner during a court hearing on February 18, 1977. That statement was:

"I can't dismiss this case with prejudice, but I wish I could." This comment is among several other prejudicial remarks which respondent COOK has directed to this petitioner. That his acts which followed this statement verified this was what he ultimately intended to accomplish, and did accomplish in a conspiratorial and fraudulent manner.

The acts of prejudice which were committed by respondent Judge DAVID M. COOK included utterances, facial expressions, mannerisms, and several orders that were contrary to the law and facts. The record is very full of these intentional acts which were wrongfully committed by respondent COOK. There is no doubt that respondent COOK is prejudiced.

Among these numerous acts of prejudice which the record reflects are the following:

1. An order signed on April 22, 1977 falsely stating there was no evidence in the record concerning this petitioner's alleged conspiracy. The record of Case CJ-76-3316 in fact contained a sworn to petition and answers to interrogatories which this petitioner had signed stating circumstances of the allegation of a conspiracy.
2. An unlawful order signed on October 28, 1977 intimidating this petitioner (plaintiff, Case CJ-76-3316) "to retain counsel or in the alternative he would dismiss this action" of Case CJ-76-3316. This is a very basic violation of this petitioner's Constitutional rights and, particularly, Title 28 U.S.C. § 1654.
3. The respondent COOK was requested to disqualify himself both orally in open court and by written motions. That he arrogantly refused and denied the written motions on November 2, 1979 and November 9, 1979. Then this petitioner was basically kicked out of court by respondent COOK granting carte blanche Summary Judgment to all allegations. Thus, COOK accomplished his earlier attitude to dismiss the case. This was ultimately the result of an unlawful conspiracy to protect and cover up the dishonest acts of the respondent attorney Stephen Jones.

This petitioner having been the victim of several acts of fraud and conspiracy which respondents committed, filed a federal lawsuit. This lawsuit alleged numerous acts by which he had become a victim. The acts which were committed by respondents come under the Civil Rights Statutes Title 42 U.S.C. 1983, 1985 and 1986. The complaint was filed in the United States District Court, Western District, of Oklahoma. This complaint was assigned the Number CIV-79-805E. After an adverse ruling to the complaint this petitioner appealed the case to the Tenth Circuit Court of Appeals. The case was then Numbered 79-2201. The Tenth Circuit Court of Appeals has disregarded all the law that this petitioner presented and ruled on November 5, 1980 that respondent DAVID M. COOK had jurisdiction. This being a very clear ruling that allows a judge to violate the law to the Nth degree which was never intended by any respectable decision.

Thus, the United States Court of Appeals for the Tenth Circuit has failed to perform their duty and enforce the Constitution and law. This has caused the need for this petition for Writ of

Certiorari and demonstrates the reason why Judge COOK felt he could be so corrupt. This is the reason he continued to sign orders when he was without jurisdiction and signed an order on March 21, 1980. This prejudicial order granted Summary Judgment against this petitioner after the case was stated to be at issue.

ARGUMENT FOR ALLOWING WRIT

This case is a direct result of the corruption and dishonesty that permeates the entire judicial system in Oklahoma. That system has operated to successfully protect and cover up the dishonesty of lawyers and judges. The respondent Judge DAVID M. COOK was acting as part of this cover-up system. His acts in this case were intentionally corrupt with the motive to protect and cover up the dishonesty of fellow lawyers. This case was originally filed because of the numerous unlawful acts committed by Judge COOK operating jointly with other respondent lawyers to achieve their protection and cover-up. This situation is so out of control that it has criminal and fraudulent intent against the citizens.

The record of this instant case shows there was an unlawful intent. Because of this intent, Judge COOK has abused his power and discretion, made false entry into the record, and usurped jurisdiction in a prejudicial manner not given by law. Further, these corrupt acts are such violations of the law that he (Cook) "ceased to be a judge." The record reflects "corrupt motives" that are even more serious than prejudice, which disqualified Judge COOK. He (Judge Cook) was disqualified by reason of prejudice and was without jurisdiction or authority over Case CJ-76-3316. He is part of the protection cover-up scheme in Oklahoma.

The cited law herein does not protect a judge who so wilfully abuses his power. He (Judge Cook) ceased to be acting as a judge and is not immune for the acts that are "not judicial" and "not within the discretion" which violate the law. Because of the "corrupt motives" he "usurped jurisdiction and discretion not given by the law." The facts and law do not give any of the respondents the shield or protection of immunity. Therefore, all of the respondents are "liable" for their acts which petitioner alleges. The allegations of conspiracy and fraud are questions of fact to be tried by jury.

The appellate jurisdiction of this court is the result of a basic Constitutional right. That right involves appearing before a judge that is not prejudiced. Not to even re-argue the aforesaid unlawful acts. The United States Court of Appeals for the Tenth Circuit has disregarded the cited law to enforce this fundamental right. This right must be enforced and is not their discretion to allow a judge to violate this Constitutional clause. Justice has been defeated.

This court should allow a Writ of Certiorari in order to reverse, vacate, set aside and hold for naught the orders of Judge DAVID M. COOK and the UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT. This case should then be remanded to the U.S. FEDERAL DISTRICT COURT OF OKLAHOMA with instructions that Judge DAVID M. COOK was disqualified and without jurisdiction. Further, that Judge DAVID M. COOK and the other defendants are without the protection of judicial immunity for the acts which they committed, and are questions of fact triable by jury.

CERTIFICATE OF SERVICE

This is to certify that on this 31st day of January, 1981 a true and correct copy of the foregoing petition was mailed, postage prepaid, to: James Sears Bryant, P.O. Box 1844, Enid, Okla. 73701; Elliott C. Fenton, P.O. Box 1638, Okla. City, Okla. 73101; and Jan Eric Cartwright, Attorney General, 112 State Capitol Bldg., Okla. City, Okla. 73105, attorneys for the respondents. Certified return receipts Nos. 047458, 047464, 047465, respectively.

Earl David Shaffer

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APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED NOV. 05 1980

EARL DAVID SHAFFER, Plaintiff-Appellant, v. DAVID M. COOK, LARRY D. LAHMAN, and STEPHEN JONES, Defendants-Appellees	)	No. 79-2201

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. 79-0805)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Earl David Shaffer, Pro Se.

Jan Eric Cartwright, Attorney General, and Manville T. Buford, Assistant Attorney General, the State of Oklahoma, Oklahoma City, Oklahoma, for Defendant-Appellee David M. Cook; Elliott C. Fenton of Fenton, Fenton, Smith, Reneau & Moon, Oklahoma City, Oklahoma, for Defendant-Appellee Larry D. Lahman; and James Sears Bryant, Enid, Oklahoma, for Defendant-Appellee Stephen Jones.

Before BARRETT, McKAY and LOGAN, Circuit Judges.

PER CURIAM.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

This is an appeal from an order of the district court dismissing appellant's complaint pursuant to Fed. R. Civ. P. 12(b) (6). The complaint was brought pursuant to 42 U.S.C. § § 1983, 1985 and 1986, alleging violation of the appellant's civil rights. It alleged that appellee Cook (an Oklahoma state trial judge) and appellees Jones and Lahman (attorneys who were involved in a state case brought by appellant and dismissed by appellee Cook) conspired to deprive appellant of his civil rights, specifically a fair trial.

No allegation of the complaint indicates that appellee, Judge Cook, acted outside the scope of the jurisdiction of his court. Thus, he is absolutely immune from liability for his judicial acts. Stump v. Sparkman, 435 U.S. 349 (1978).

As to the claim against the two attorneys, the district court, in dismissing the action against them, concluded that "a private person who is alleged to have conspired with a state district judge who is entitled to immunity cannot be held liable..." While we agree that the conspiracy element of appellant's claim, *see* Adickes v. S.H. Kress and Co., 398 U.S. 144, 150 (1970), would not be fulfilled even if appellant's allegations were true, we have recently held that the immunity of a state official will not necessarily protect a private individual alleged to have conspired with him. Norton v. Liddel, 620 F.2d 1375 (10th Cir. 1980). The test laid out in *Norton* to determine whether a private individual has actively conspired with an immune state official is as follows:

> It is our view that the critical inquiry in making this determination is: Has the plaintiff demonstrated the existence of a significant nexus or entanglement between the absolutely immune State official and the private party in relation to the steps taken by each to fulfill the objects of their conspiracy? The resolution of such issues must, of necessity, be made on a case-to-case basis.

620 F.2d at 1380.

Appellant's only allegation supporting his conspiracy theory against the attorneys is that he saw one of them speak with the judge in the courthouse before each hearing. The complaint thus concludes that that attorney, and the other by association apparently, had defrauded him in a conspiracy with the court. Nothing in the complaint indicates that the court or the attorneys were acting outside the confines of the neutral function of a judicial forum. There is no cause of action under the Civil Rights Act in this case where the state did no more than furnish a forum to private parties and had no interest in the outcome. *See* Torres v. First State Bank of Sierra County, 588 F.2d 1322, 1326 (10th Cir. 1978). We have stated before that "[l]awyers do not act under color of state law solely by engaging in private litigation on behalf of their clients." Brown v. Chaffee, 612 F.2d 497, 501 (10th Cir. 1979). Appellant's amended complaint fails to allege the kind of conspiratorial nexus between Judge Cook and the attorneys contemplated in *Norton* that would support a cognizable § 1983 or § 1985 non-immune conspiracy intended to deprive appellant of his constitutional rights. The *pro se* complaint was thus properly dismissed. [1] *See* Estelle v. Gamble, 429 U.S. 97, 107 (1976).

Accordingly, the judgment of the district court is affirmed. The mandate shall issue forthwith.

---

1. Appellant's § 1985 and § 1986 claims were also properly dismissed due to appellant's failure to allege any "invidiously discriminatory motivation" of appellees. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (§ 1985); Hahn v. Sargent, 523 F.2d 461, 469-70 (1st Cir. 1976), *cert. denied*, 425 U.S. 904 (1976) (§ 1986 claim is dependent upon successful § 1985 claim).

PUBLISH

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED SEPT. 19, 1979

EARL DAVID SHAFFER,)
Plaintiff,)
v.)
No. CIV-79-805-E
DAVID M. COOK,)
Defendant,)
LARRY D. LAHMAN,)
Additional Defendant,)
and
STEPHEN S. JONES)
Additional Defendant,)

ORDER

Earl David Shaffer, the plaintiff herein, has filed a motion for disqualification of the assigned trial judge in the present case and has accompanied said motion with his affidavit pursuant to 28 U.S.C. § 144.

The affidavit provides:

> "Plaintiff, EARL DAVID SHAFFER, being first duly sworn, states under oath, that he is the Plaintiff in the above entitled claim; that the affiant has reason to believe, and does in fact believe that he cannot have a fair and impartial trial before the Honorable Luther Eubanks, judge in the above styled matter, by reason of bias and prejudice of said Honorable Luther Eubanks."

The plaintiff is correct in asserting in his "statement of facts" which was attached to the motion that a court, in considering a motion to recuse under § 144, must accept all facts stated in the affidavit as being true. See Bell v. Chandler, 569 F.2d 556 (10th Cir. 1978); United States v. Ritter, 540 F. 2d 459 (10th Cir. 1976).

The difficulty with the affidavit presented by plaintiff, however, is that it contains no facts which must be taken as true, but merely make conclusory assertions. As such, it is legally and fatally insufficient. See Knoll v. Socony Mobil Oil Company, 369 F.2d 425 (10th Cir. 1966), cert. denied, 386 U.S. 977 (1967); United States v. Bennett, 539 F.2d 45 (10th Cir. 1976), cert. denied, 429 U.S. 925 (1976).

Accordingly,

IT IS ORDERED that plaintiff's motion to disqualify the assigned trial judge be and the same is hereby denied.

The Clerk of the Court is directed to mail a copy hereof to counsel of record.

DATED this 19 day of September, 1979.

LUTHER B. EUBANKS

United States District Judge

No. 80-1302

In the Supreme Court of the United States

OCTOBER TERM, 1980

EARL DAVID SHAFFER,
Petitioner,

VERSUS

DAVID M. COOK, LARRY D. LAHMAN
and STEPHEN JONES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONSE BRIEF OF DAVID M. COOK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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On the Brief

April, 1981

QUESTION PRESENTED

Did the United States Court of Appeals for the Tenth Circuit err in affirming the order of the District Court which dismissed Petitioner's action against the Respondent David M. Cook for failure to state a claim upon which relief could be granted?

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No. 80-1302

In the
Supreme Court of the United States
OCTOBER TERM, 1980

EARL DAVID SHAFFER,
Petitioner,

VERSUS

DAVID M. COOK, LARRY D. LAHMAN
and STEPHEN JONES,
Respondents.

RESPONSE BRIEF OF DAVID M. COOK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent David M. Cook, by and through the Attorney General of Oklahoma, respectfully prays this Court to affirm the decision rendered by the United States Court of Appeals for the Tenth Circuit in *Shaffer* v. *Cook*, 634 F.2d 1259 (10th Cir. 1980).

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, reported as *Shaffer* v. *Cook*, 634 F.2d 1259 (10th Cir. 1980), appears in Appendix "A" herein.

STATEMENT OF THE CASE

In July of 1979, Earl David Shaffer (hereafter "Petitioner") commenced an action in the United States District Court for the Western District of Oklahoma (hereafter

"District Court") pursuant to 42 U.S.C. §§ 1983, 1985 and 1986 against David M. Cook, Judge of the District Court of Oklahoma County, State of Oklahoma (hereafter "Respondent"), Larry D. Lahman, an Enid, Oklahoma attorney, and Stephen Jones, also an attorney from Enid, Oklahoma. The action was prompted by Case No. CJ-76-3316 in the District Court of Oklahoma County, wherein Petitioner was plaintiff, Stephen Jones was defendant, Larry Lahman was defendant's counsel and Respondent was the assigned Judge.

In his complaint, Petitioner alleged that Respondent and the named defendants conspired in the state court proceeding to defraud Petitioner and deprive him of his civil rights, specifically a fair trial. Summarized, Petitioner alleged that Respondent breached his judicial duty in the following particulars:

a. That he exhibited "an actual bias and prejudice;"

b. That he denied to Plaintiff certain Constitutional guarantees, to-wit: fair and impartial hearing, equal protection of the law and due process of law;

c. That he conspired with Jones and Lahman to "defraud" Plaintiff of those Constitutional rights;

d. That he made certain "unreasonable, dishonest and unlawful decisions" in furtherance of that conspiracy;

e. That his acts were intentional;

f. That he failed to disqualify himself upon Plaintiff's request; and

g. That the foregoing violations were of such magnitude as to constitute "non-judicial" acts tantamount to divestiture of jurisdiction.

By reason of Respondent's breaches of duty, Petitioner alleged damages in the nature of expense to remedy the aforesaid injustices through necessary appeal, mental and physical pain and suffering, loss of health and nervous frustration and injury to his business and reputation.

To the complaint, Respondent moved to dismiss the cause pursuant to Rule 12(b)(6), Fed.R.Civ.P., on the ground, among others, that Respondent was immune from suit for his judicial acts. The District Court, taking all the well pleaded factual allegations of Petitioner as true and indulging all reasonable inferences therefrom in favor of Petitioner, determined that the following factual allegations had been made against Respondent:

> "(1) Judge Cook was purporting to act at all times as an Oklahoma County District Judge.
>
> "(2) Judge Cook refused to disqualify himself when requested by the plaintiff.
>
> "(3) Judge Cook and defendant Lahman were seen by the plaintiff in the chamber hallway of the defendant judge before each hearing in the state court case.
>
> "(4) The defendant judge made the following statements in open court:
>
> "(a) 'What do you want me to do, dismiss this lawsuit?'
>
> "(b) 'I can't dismiss this case with prejudice, but I wish I could.'
>
> "(c) 'I'll remember this case.'
>
> "(d) 'That won't be tolerated. Oh, I'm impressed with your jury speech.'

"(e) 'You stuck with that answer at trial and you're going to regret it.'

"(5) The defendant judge accepted certain statements made by the defendant Lahman regarding plaintiff's conspiracy claim and signed an order on July 15, 1977, striking conspiracy from plaintiff's petition.

"(6) Judge Cook signed an order in Case No. CJ-76-3316 on October 28, 1977, stating his intention and desires to dismiss plaintiff's case. This was also discussed in open court." [Pages 3 and 4 of District Court's order in *Shaffer* v. *Cook*, No. CIV-7[illegible]-805-E (W.D. Okl. Oct. 11, 1979)].

In view thereof, the District Court in *Shaffer* v. *Cook*, supra, sustained Respondent's motion to dismiss concluding that Respondent, at all times material, was acting in his capacity as a state district court judge and was, thus, immune from liability for damages.

The United States Court of Appeals for the Tenth Circuit, in *Shaffer* v. *Cook*, 634 F.2d 1259 (10th Cir. 1980), affirmed the judgment of the District Court upon determining that "[n]o allegation of the complaint indicates that appellee, Judge Cook, acted outside the scope of the jurisdiction of his court." (634 F.2d 1260).

ARGUMENT

RESPONDENT IS IMMUNE FROM SUIT UNDER THE DOCTRINE OF JUDICIAL IMMUNITY.

Respondent is immune from civil suits based on acts or omissions occurring in the exercise of his judicial function. The jurisdiction of the trial court having vested, all activities of the judge during sessions of court are immune from suit or question.

This Court in *Pierson* v. *Ray*, 386 U.S. 547 (1967) stated as follows:

> ". . . Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley* v. *Fisher*, 13 Wall. 335, 20 L ed 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' (*Scott* v. *Stansfield*, LR 3 Ex 220, 223 (1868), quoted in *Bradley* v. *Fisher*, supra, 349; note, at 350, 20 L ed at 650.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." (386 U.S. 553, 554).

Similarly, in *Stump* v. *Sparkman,* 435 U.S. 349 (1978), this Court stated that:

> "The Court of Appeals correctly recognized that the necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him . . . [T]he scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.' 13 Wall, at 351, 20 L Ed 646." (435 U.S. 356, 357).

This Court in *Stump* v. *Sparkman,* supra, further stated that the test for determining whether an act by a judge is a judicial act, thus conferring immunity, is (1) whether it is an act normally performed by a judge and (2) whether the parties dealt with the judge in his judicial capacity.

The court over which Respondent presides is one possessing unlimited original jurisdiction over all justiciable matters. See Okla. Const., Art. 7, § 7 and 20 O.S. 1971, § 91.1. Furthermore, assuming the facts alleged in Petitioner's complaint to be true, *i.e.,* that Respondent exhibited a pattern of bias and prejudice, denied Petitioner certain fundamental rights, improperly failed to disqualify himself, etc., Petitioner alleged and his complaint reflected that Respondent "at all times hereinafter stated was purporting to act as a [District] Judge for the County of Oklahoma. . . ." All acts complained of were judicial acts—that Respondent allegedly was biased, prevented a fair and im-

partial trial, made unlawful decisions, and denied Petitioner due process. The prejudicial statements alleged to have been made by Respondent were statements made in open court in the conduct of judicial proceedings. Moreover, the allegation that defendant Lahman was seen with Respondent in the chamber hallway before each hearing in the state court proceeding could suggest impropriety only if it can be related to subsequent actions taken by the judge while conducting judicial proceedings in open court.

No act was alleged to have occurred and no duty was alleged to have been breached which did not arise from Respondent acting in his official capacity as the assigned district judge in the state court action. All of the acts complained of by Petitioner were judicial acts, *i.e.*, acts normally performed by a judge, and the parties, including Petitioner, dealt with Respondent in his official judicial capacity. Thus, Respondent enjoys absolute immunity from the present action.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be denied leaving in force and effect the decision rendered in *Shaffer* v. *Cook*, 634 F.2d 1259 (10th Cir. 1980).

Respectfully submitted,

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April, 1981

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Response Brief were mailed to the persons listed below on the ..... day of April 1981, by placing same in the U.S. Mail with postage fully prepaid.

All parties required to be served have been served.

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APPENDIX A

[Filed November 5, 1980]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

EARL DAVID SHAFFER, Plaintiff-Appellant,	)	
v.	)	
	)	No. 79-2201
DAVID M. COOK, LARRY D. LAHMAN, and STEPHEN JONES, Defendants-Appellees.	)	

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. 79-0805)

Submitted on the briefs pursuant to Tenth Circuit Rule 9: Earl David Shaffer, pro se.

Jan Eric Cartwright, Attorney General, and Manville T. Buford, Assistant Attorney General, the State of Oklahoma, Oklahoma City, Oklahoma, for Defendant-Appellee David M. Cook; Elliott C. Fenton of Fenton, Fenton, Smith, Reneau & Moon, Oklahoma City, Oklahoma, for Defendant-Appellee Larry D. Lahman; and James Sears Bryant, Enid, Oklahoma, for Defendant-Appellee Stephen Jones.

Before BARRETT, McKAY and LOGAN, Circuit Judges.

PER CURIAM.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the

determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

This is an appeal from an order of the district court dismissing appellant's complaint pursuant to Fed. R. Civ. P. 12(b) (6). The complaint was brought pursuant to 42 U.S.C. §§ 1983, 1985 and 1986, alleging violation of the appellant's civil rights. It alleged that appellee Cook (an Oklahoma state trial judge) and appellees Jones and Lahman (attorneys who were involved in a state case brought by appellant and dismissed by appellee Cook) conspired to deprive appellant of his civil rights, specifically a fair trial.

No allegation of the complaint indicates that appellee, Judge Cook, acted outside the scope of the jurisdiction of his court. Thus, he is absolutely immune from liability for his judicial acts. Stump v. Sparkman, 435 U.S. 349 (1978).

As to the claim against the two attorneys, the district court, in dismissing the action against them, concluded that "a private person who is alleged to have conspired with a state district judge who is entitled to immunity cannot be held liable. . . ." While we agree that the conspiracy element of appellant's claim, *see* Adickes v. S. H. Kress and Co., 398 U.S. 144, 150 (1970), would not be fulfilled even if appellant's allegations were true, we have recently held that the immunity of a state official will not necessarily protect a private individual alleged to have conspired with him. Norton v. Liddel, 620 F.2d 1375 (10th Cir. 1980). The test laid out in *Norton* to determine whether a private individual has actively conspired with an immune state official is as follows:

> It is our view that the critical inquiry in making this determination is: Has the plaintiff demonstrated the existence of a significant nexus or entanglement between the absolutely immune State official and the private party in relation to the steps taken by each

> to fulfill the objects of their conspiracy? The resolution of such issues must, of necessity, be made on a case-to-case basis.

620 F.2d at 1380.

Appellant's only allegation supporting his conspiracy theory against the attorneys is that he saw one of them speak with the judge in the courthouse before each hearing. The complaint thus concludes that that attorney, and the other by association apparently, had defrauded him in a conspiracy with the court. Nothing in the complaint indicates that the court or the attorneys were acting outside the confines of the neutral function of a judicial forum. There is no cause of action under the Civil Rights Act in this case where the state did no more than furnish a forum to private parties and had no interest in the outcome. *See* Torres v. First State Bank of Sierra County, 588 F.2d 1322, 1326 (10th Cir. 1978). We have stated before that "[l]awyers do not act under color of state law solely by engaging in private litigation on behalf of their clients." Brown v. Chaffee, 612 F.2d 497, 501 (10th Cir. 1979). Appellant's amended complaint fails to allege the kind of conspiratorial nexus between Judge Cook and the attorneys contemplated in *Norton* that would support a cognizable § 1983 or § 1985 non-immune conspiracy intended to deprive appellant of his constitutional rights. The *pro se* complaint was thus properly dismissed.[1] *See* Estelle v. Gamble, 429 U.S. 97, 107 (1976).

Accordingly, the judgment of the district court is affirmed. The mandate shall issue forthwith.

---

[1] Appellant's § 1985 and § 1986 claims were also properly dismissed due to appellant's failure to allege any "invidiously discriminatory motivation" of appellees. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (§ 1985); Hahn v. Sargent, 523 F.2d 461, 469-70 (1st Cir. 1976), *cert. denied*, 425 U.S. 904 (1976) (§ 1986 claim is dependent upon successful § 1985 claim).

SUPREME COURT, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

No. 80-1302

In the Supreme Court of the United States

OCTOBER TERM, 1980

EARL DAVID SHAFFER,
Petitioner,

VERSUS

DAVID M. COOK, LARRY D. LAHMAN
and STEPHEN JONES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MEMORANDUM OF RESPONDENT STEPHEN JONES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April, 1981

QUESTION PRESENTED

Whether a private party alleged to have conspired with an immune state officer can nonetheless be held liable under 42 U.S.C. Sec. 1983 where the state officer is entitled to absolute immunity for his acts on which the claim is based.

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No. 80-1302

In the
Supreme Court of the United States
OCTOBER TERM, 1980

EARL DAVID SHAFFER,
Petitioner,

VERSUS

DAVID M. COOK, Oklahoma County District Judge,
LARRY D. LAHMAN and STEPHEN JONES,
Respondents.

MEMORANDUM OF RESPONDENT STEPHEN JONES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-3a) is reported at 634 F.2d 1259 (10th Cir. 1980).

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 1a-3a) was entered on November 5, 1980. On February 2, 1981, Petitioner filed a petition for Writ of Certiorari. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. 1983 provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

1. Petitioner, Earl David Shaffer, appearing *pro se,* brought this action against David M. Cook, an Oklahoma County District Judge, and Larry D. Lahman and Stephen Jones, private attorneys licensed to practice in the State of Oklahoma. Petitioner alleged that said parties conspired to defraud him and deprive him of due process and equal protection of the laws, in violation of his Civil Rights under 42 U.S.C. 1983, 1985 and 1986.

This action was commenced following a lawsuit that Shaffer brought against Jones in the state district court of Oklahoma County, Oklahoma. That action, which sought over $10 million in damages from Jones, was assigned to Judge Cook, District Court Judge for the Seventh Judicial District of Oklahoma. Jones retained Lahman to represent him in that action. After Judge Cook dismissed Shaffer's action against Jones, Shaffer filed the instant action against Judge Cook, Lahman and Jones, claiming that all of the above said parties had conspired against him in the state court action to violate his federal civil rights.

2. The present suit, based on 42 U.S.C. 1983, 1985, and 1986 makes the following allegations. Insofar as Respondent Jones is concerned, Petitioner alleges that Jones par-

ticipated in the purported conspiracy in the following manner:

> "Defendant, Stephen S. (*sic*) Jones was a defendant in a case CJ-76-3316 (*sic*) and accepted the fraudulent acts which were performed by David M. Cook and Larry Lahman in his behalf and filed an affidavit to further their acts of conspiracy to defraud the plaintiff."

Petitioner alleges that Lahman participated in the alleged conspiracy as follows:

> "(a) There were obvious contacts between Judge Cook and Lahman before each hearing in the state court case because Shaffer saw Lahman in Judge Cook's Chamber hallway before each hearing . . .
>
> "(b) Judge Cook would 'openly in court further conspire with Larry D. Lahman'; Judge Cook visibly and orally exhibited his 'demeanor' towards Shaffer; that Judge Cook had no intention of being fair and impartial; and that Judge Cook stated that he wished that he could dismiss the case with prejudice . . .
>
> "(c) That Lahman caused fraud upon Shaffer in the state court case by mailing to Shaffer an instrument showing a Certificate of Service on February 14, 1977, but which Shaffer did not receive until February 18, 1977, with a postmark of February 17, 1977 . . .
>
> "(d) Lahman made false and fraudulent statements about a conspiracy alleged by Shaffer in the state court case, and that this resulted in Judge Cook entering an order striking conspiracy from plaintiff's state court petition . . .
>
> "(e) Judge Cook refused to disqualify himself upon request but continued to conspire with Lahman to deny Shaffer a fair trial, due process of law and equal protection of the law . . .

"(f) Judge Cook entered an order on October 28, 1977, dismissing Shaffer's state court action. This alleged fraudulent action was discussed and agreed to in open court by Judge Cook and Lahman."

Finally, in regards to Judge Cook, Petitioner alleges the following acts:

"(a) That he exhibited 'an actual bias and prejudice';

"(b) That he denied appellant certain constitutional guarantees, to-wit: fair and impartial hearing, equal protection of the law and due process of law;

"(c) That he conspired with the co-defendants to 'defraud' appellant of those constitutional rights;

"(d) That he made certain 'unreasonable, dishonest, and unlawful decisions' in furtherance of that conspiracy;

"(e) That his acts were intentional;

"(f) That he failed to disqualify himself on appellant's request; and

"(g) That the foregoing violations were of such magnitude as to constitute 'non-judicial acts' tantamount to divestiture of jurisdiction."

3. The district court on October 11, 1979 disposed of all of Petitioner's claims stated above by dismissing his federal court suit. In its ruling the court dismissed Judge Cook on the basis that he was entitled to absolute immunity under all three causes of action. Insofar as respondents Jones and Lahman were concerned, the district court held that they were similarly immune under the rule that a private person cannot be held liable for conspiring with an immune state official. In addition, the district court

judge ruled that the 42 U.S.C. 1984 and 1985 actions were improperly filed because the pleadings did not reflect any complaint of racial or other class-based discrimination.

4. In a decision dated November 5, 1980, the Tenth Circuit Court of Appeals affirmed the federal district court's dismissal of Petitioner's complaint. In doing so, however, the court noted that there was *no absolute immunity* for a private person who conspired with an otherwise immune state official. Instead the court ruled that such immunity would exist only where the plaintiff failed to plead the existence of a significant "nexus" or entanglement between the absolutely immune state official and the private party in relation to the steps taken by each to fulfill the objects of the conspiracy. While affirming the decision of the district court, the Tenth Circuit made it clear that such resolution was to be made on a case-to-case basis rather than being covered by any blanket *per se* rule. In addition, the Tenth Circuit reaffirmed the rule that 42 U.S.C. 1984 and 1985 were inapplicable where there was no racial discrimination alleged.

SUMMARY OF ARGUMENT

Respondent Jones believes that the question presented to this Court is indeed an important one. He is compelled by Disciplinary Rule 5, Okl. St. Ann. Ch. 1 App. 3 DR 7-106(B)(1) to point out to this Court that there does exist a conflict among the circuits in regard to the question in issue. In addition, under any fair reading of the civil rights acts it is clear that the question posed is one of important public policy and should be answered by this Court. However, Respondent believes that this is not the proper case to do so. The Petitioner is appearing herein *pro se*. In addition, he has appeared *pro se* throughout numerous state court proceedings and through the entire gambit of lower court and appellate court proceedings in the federal system. Petitioner has not framed nor briefed the issues in this Court or any court below in a manner helpful to the proper resolution thereof. An examination of the pleadings Petitioner has filed herein will demonstrate why this Court should not decide the question of such important public policy by granting certiorari in the instant case. Finally, it would be inappropriate to grant certiorari in the instant case for the reason that Petitioner has failed throughout his pleadings in the district court to alleged with particularity any actual conspiracy between the parties involved, making it unnecessary for this Court to decide in the instant case whether or not the private parties were immune in the lawsuits below.

ARGUMENT

I. THERE DOES EXIST A CONFLICT AMONG THE CIRCUITS AS TO WHETHER A PRIVATE PARTY MAY BE HELD LIABLE UNDER 42 U.S.C. 1983 FOR AN ALLEGED CONSPIRACY BASED ON ACTS OF CONSPIRACY WITH AN OTHERWISE IMMUNE STATE OFFICIAL.

It is evident that there exists a conflict of authority regarding the question of whether a private individual may be held liable under 42 U.S.C. 1983 for conspiring with an otherwise immune state official. Several approaches have been taken by the various Courts of Appeal and other lower courts. Several circuits have adopted the rule that a private person may not be held liable under 42 U.S.C. 1983 for acts of conspiracy with an immune state official. This rule seems to have been adopted in the Third, Sixth and Ninth Circuits. See *Waits* v. *McGowan,* 516 F.2d 203 (3rd Cir. 1975); *Hazo* v. *Geltz,* 537 F.2d 747 (3rd Cir. 1976); *Kurz* v. *Michigan,* 548 F.2d 172 (6th Cir. 1977) *cert. den.* 434 U.S. 972 (1977), *reh. den.* 434 U.S. 1089 (1978); *Haldane* v. *Chagnon,* 345 F.2d 601 (9th Cir. 1965); *Sykes* v. *California,* 497 F.2d 197 (9th Cir. 1974); *Briley* v. *California,* 564 F.2d 849 (9th Cir. 1977). Several circuits, however, apply a rule of limited immunity for private persons alleged to have conspired with immune state officers, requiring a kind of "nexus" or particularized complaint of conspiracy. Such a rule has been adopted in the Seventh and Tenth Circuits. See *Sparkman* v. *McFarlin,* 601 F.2d 261 (7th Cir. 1979); *Norton* v. *Liddel,* 620 F.2d 1375 (10th Cir. 1980); *Shaffer* v. *Cook,* supra. Finally, two circuits have adopted the rule that a private person is liable under

42 U.S.C. 1983 regardless of the immunity of the state official they allegedly conspired with. This is the rule of the First and Fifth Circuits. See *Kermit Constr. Corp.* v. *Banco Credito Y Ahorro Ponceno,* 547 F.2d 1 (1st Cir. 1976); *Slotnick* v. *Staviskey,* 560 F.2d 31 (1st Cir. 1977), *cert. den.* 434 U.S. 1077 (1978); *Downs* v. *Sawtelle,* 574 F.2d 1 (1st Cir. 1978), *cert. den.* 439 U.S. 910 (1978); *Sparks* v. *Duval County Ranch Co., Inc.,* 604 F.2d 976 (5th Cir. 1979).

Several circuits have not decided the issue on the Court of Appeals level but have conflicting district court decisions. In the Fourth Circuit, the following cases support the rule that there is immunity for a private person for acts allegedly committed while conspiring with an immune state official. *Phillips* v. *Singletary,* 350 F.Supp. 297 (D.C. S.C. 1972); *Dennis* v. *Hein,* 413 F.Supp. 1137 (D.C. S.C. 1976). *Contra,* see *Adkins* v. *Adkins,* 459 F.Supp. 406 (D.C. W.Va. 1978). In the Eighth Circuit, see *Griffin* v. *Nangle,* 413 F. Supp. 913 (D.C. Mo. 1974), for the rule supporting immunity of a private party. Furthermore, see *Fine* v. *City of New York,* 529 F.2d 70 (2d Cir. 1975). While that case has been cited for authority that the Second Circuit has adopted the rule that there is no immunity for a private person conspiring with an immune state official, a closer examination of the case reveals the language is broad enough to negate the rule for which it allegedly stands. While this case states generally that a private citizen can be liable under 42 U.S.C. 1983 if he conspires with a state official, it never explicitly considers the question of whether the private actor is liable where the state actor is immune.

As could be expected there are varying rationales supporting the divergence of opinion on this issue. Those cir-

cuits which adopt a *per se* rule of immunity for private persons conspiring with immune state officials do so for several reasons. For one, it is believed that such a rule will discourage frivolous lawsuits from dissatisfied litigants in state courts. Related to this is the interest in preserving judicial federalism and avoiding having federal courts serve as monitors over state courts, providing additional remedies for the losing party therein. This is particularly true where the only state action complained of is that of furnishing a neutral forum to decide the private litigants' dispute.

A further interest supporting the rule of private immunity is that to adopt a contrary rule would discourage participation in the state judicial process. The fear is that both private persons who are victims and/or witnesses will be discouraged from participating in the state court process by fear of being penalized by civil rights suits. More importantly, many believe that in the absence of a *per se* rule of immunity the discretion and independence of state judges will be impaired. One basis for having judicial immunity is to preserve the independence of the state judiciary and to eliminate any liability for the exercise of the judge's discretion. Such an interest is effectively abrogated if, although the state judge is immune from suit, he is subject to being deposed or appearing as a witness in a civil case to explain the very acts for which he is immune. In addition, it is felt that there is something fundamentally unfair about subjecting a lay person to a civil rights action for the very same acts that one educated in the law, the judge, is immune. If the judge himself condones or participates in the acts on which the civil rights suit is based, it seems

unfair to hold lay persons liable for those very same acts. See Judge Sprecher's opinion, concurring, in *Sparkman* v. *McFarlin*, supra, at pp. 264-266. Finally, some courts feel that immunity for private parties is an outgrowth of the elements of 42 U.S.C. 1983 itself. In other words they find lacking the element of committing an act "under color of state law" where there is no state official acting and being held liable. *Haldane* v. *Chagnon*, supra, at pp. 604-605.

On the other hand, those who reject the immunity of private parties who conspire with state officials, do so on different grounds. They downplay the harm that would result from judges being compelled to testify in civil matters. In this regard they emphasize that the judge may be amenable to testify in claims for equitable relief or in cases where they are ordinary witnesses, such as habeas corpus or post-conviction relief proceedings. In addition, they downplay the value of exempting judges from being in the position of having to testify altogether, holding that this is not necessary to the independence of the judiciary. Finally, those opposing the *per se* rule of immunity reject the belief that "color of state law" and immunity are the same concepts. Instead, they contend that a person may act under color of state law and still be immune for his actions. Therefore, simply because one is not a state official nor acting in concert with one who is liable does not remove the element of "color of law". See, *Sparks* v. *Duval County Ranch Co., Inc.*, supra, at pp. 979-983.

There is a third view on the immunity issue as well. Several courts hold that while there should not be a *per se* rule of immunity for private persons who have conspired with state officials, such immunity should exist unless a

proper "nexus" is alleged between the acts of the state official and the private person. For example, in *Norton* v. *Liddel,* supra, the test enunciated was:

> "It is our view that the critical inquiry in making this determination is: Has the plaintiff demonstrated the existence of a significant nexus or entanglement between the absolute immune state official and the private party in relation to the steps taken by each to fulfill the objects of their conspiracy? The resolution of such issues must, of necessity, be made on a case-to-case basis." 620 F.2d at 1380.

In other words, the approach in *Norton* was one on a case-by-case basis. In those cases where the state official was merely acting in a neutral manner, such as providing forum for a lawsuit, issuing an order, and having no alleged interest in the outcome of the case, the nexus would not be deemed present.

> "Rather, we held that the State's action in issuing the *ex parte* temporary restraining order was not sufficiently entangled with the defendant private party's action so as to clothe the private party actions as that of the State's. Where a State, such as in *Torres,* does no more than furnish a neutral forum for the resolution of issues and has no interest in the outcome of the lawsuit, the State court's action in issuing an order cannot be imputed to the private party seeking the issuance of the order." *Norton* v. *Liddel,* supra, at 1380.

The court in *Norton,* however, held that the nexus could be met where there were allegations that the state officer did more partisan acts. Such acts could be where the state officer conspired with the private party to issue

an indictment against someone with absolutely no foundation and where the state had an interest in doing so.

> "We specifically observed that had the deputy sheriff *'colluded'* with the bank officer to misrepresent the contents of the order it would be a different matter." *Norton* v. *Liddel,* supra, at 1380.

Thus, the nexus discussed in *Norton,* supra, seems to require the existence of a connection between the private party's conduct and the state actor's conduct and that that connection must indicate that the state is an active and partisan conspirator in the action. The allegations must be such as to give rise to the possibility that both the immune state officer and the private party have engaged in overt abuse of judicial process. Otherwise, where the official and the private party are only conducting relatively neutral proceedings, the rule of immunity would apply. Also see *Sparkman* v. *McFarlin,* supra, where the per curiam opinion seems to agree that a private party could be liable where the conspiracy was alleged with particularity between the state officer and the private party. Such particular allegations and the various views of the judges of that circuit are outlined in the concurring opinions therein.

In summary, the circuit courts are at odds with how the question presented here should be properly resolved. While some of them adopt a *per se* rule of immunity for private persons conspiring with state officials, others have a more limited approach — utilizing the "nexus" approach. Still other circuits hold outright that a private party is liable even though he conspires with a public official who is otherwise immune. The conflict is such that this Court should resolve the issue once and for all for the guidance of lawyers and judges throughout the nation.

II. THIS IS NOT THE PROPER CASE FOR THE RESOLUTION OF SUCH AN IMPORTANT QUESTION OF PUBLIC POLICY.

The question of immunity of private persons under 42 U.S.C. 1983 is one of profound significance for lawyers and litigants throughout this country. However, this case is not a proper one for the resolution of that issue. The Petitioner is represented herein *pro se*. He has been throughout the entire course of these proceedings. Petitioner represented himself *pro se* throughout the Oklahoma County court proceedings, filing some four amended complaints before finally having his conspiracy count dismissed for the last time. In addition, said complaints alleged amounts ranging from five to ten million dollars against Respondents Jones and Lahman. When such lawsuits proved unsuccessful Petitioner persisted in litigation, going to federal court and suing both the lawyers and the judge in the Oklahoma court, for an amount in excess of $10 million. The pleadings throughout this case, including several amended petitions in federal court, demonstrate that this Petitioner is not able to effectivley represent himself or to effectively frame these issues for this Court's consideration. If the Court is to resolve such an important issue it should do so in a case where the issues may be briefed effectively and fully and the decision rendered on its merits rather than by default or by error.

In addition, the question of the liability of a private party who conspires with a state official does not need to be resolved in this case in order to properly dispose of the claim herein asserted. Even putting the immunity question aside, Petitioner does not state a valid cause of action

against these Respondents. For example, Petitioner's only allegation against Respondent Jones is that Jones "accepted the fraudulent acts" of Judge Cook and Larry Lahman in his behalf and filed an affidavit in the case "to further his conspiracy." The allegations against the other Respondents in this case likewise fail to state the proper elements of an action based on 42 U.S.C. 1983 since they are purely conclusionary. Therefore, the resolution of the immunity issue is not necessary in order to sustain the decision of the Tenth Circuit.

CONCLUSION

Wherefore, premises considered, Petitioner's petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April, 1981

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Memorandum were mailed to the persons listed below on the ..... day of April 1981, by placing same in the U.S. Mail with postage fully prepaid.

All parties required to be served have been served.

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FILED
APR 24 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1302

In the Supreme Court of the United States

OCTOBER TERM, 1980

EARL DAVID SHAFFER,
Petitioner,

VERSUS

DAVID M. COOK, LARRY D. LAHMAN,
and STEPHEN JONES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONSE OF RESPONDENT LARRY D. LAHMAN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Attorney for Respondent
Larry D. Lahman

April, 1981

QUESTION PRESENTED

Did the United States Court of Appeals for the Tenth Circuit err in affirming the Order of the United States District Court for the Western District of Oklahoma which dismissed petitioner's action against respondent Larry D. Lahman for failure to state a claim upon which relief could be granted?

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No. 80-1302

In the
Supreme Court of the United States
OCTOBER TERM, 1980

EARL DAVID SHAFFER,
Petitioner,

VERSUS

DAVID M. COOK, LARRY D. LAHMAN,
and STEPHEN JONES,
Respondents.

RESPONSE OF RESPONDENT LARRY D. LAHMAN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Larry D. Lahman, by and through his attorney, Elliott C. Fenton, respectfully prays this Court to affirm the decision rendered by the United States Court of Appeals for the Tenth Circuit in *Shaffer* v. *Cook*, 634 F.2d 1259 (10th Cir. 1980).

STATEMENT OF THE CASE

Petitioner filed an action in the United States District Court for the Western District of Oklahoma, No. CIV-79-805E, against David M. Cook, Larry D. Lahman, and Stephen S. Jones. It is alleged in the Second Amended Complaint that Jones was an attorney who formerly represented petitioner in a divorce action, that petitioner had sued Jones in the State District Court in Oklahoma County, Oklahoma, and that Lahman represented Jones in that ac-

tion and that Cook was the judge. It is alleged that all respondents conspired to defraud the petitioner and to deny him equal protection of the laws and due process of law (p. 3, Second Amended Complaint).

In his Second Amended Complaint petitioner states that Lahman was a party to the alleged fraud and conspiracy in the following particulars:

"(a) There were obvious contacts between Judge Cook and Lahman before each hearing in the state court case because Shaffer saw Lahman in Judge Cook's chamber hallway before each hearing. (Paragraph II Second Amended Complaint.)

"(b) Judge Cook would 'openly in court further conspire with LARRY D. LAHMAN'; Judge Cook visibly and orally exhibited his 'demeanor' toward Shaffer; that Judge Cook had no intention of being fair and impartial; and that Judge Cook stated that he wished that he could dismiss the case with prejudice. (Paragraph II Second Amended Complaint.)

"(c) That Lahman caused fraud upon Shaffer in the state court case by mailing to Shaffer an instrument showing a Certificate of Service on February 14, 1977, but which Shaffer did not receive until February 18, 1977, with a postmark of February 17, 1977. (Paragraph III Second Amended Complaint.)

"(d) Lahman made false and fraudulent statements about a conspiracy alleged by Shaffer in the state court case, and that this resulted in Judge Cook entering an Order striking conspiracy from plaintiff's state court petition. (Paragraph IV Second Amended Complaint.)

"(e) Judge Cook refused to disqualify himself upon request but continued to conspire with Lahman to deny Shaffer a fair trial, due process of law and equal protection of the law. (Paragraph IV Second Amended Complaint.)

"(f) Judge Cook entered an Order October 28, 1977, dismissing Shaffer's state court action. This alleged fraudulent action was discussed and agreed to in open court by Judge Cook and Lahman."

The District Court sustained Motion to Dismiss of Respondent Lahman and the United States Court of Appeals for the Tenth Circuit affirmed in *Shaffer* v. *Cook,* 634 F.2d 1259 (10th Cir. 1980).

ARGUMENT

Petitioner seeks to recover judgment against respondent Lahman for alleged violations of 42 U.S.C. 1983 which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The acts of a private individual such as Lahman can constitute acts done under color of state law as required under 42 U.S.C. 1983 if there is joint activity or a conspiracy between the private individual and a state official

acting within the authority of his office. *Norton* v. *Liddel,* 620 F.2d 1375 (10th Cir. 1980).

For the reasons stated in the Response Brief of David M. Cook there is absolute immunity for respondent Cook on account of his conduct as a judge.

A careful analysis of the conduct of Lahman as specified by petitioner reveals that there is no joint activity or conspiracy involving Cook and Lahman. Therefore, the District Court was correct in holding that petitioner failed to state a claim upon which relief may be granted.

An excellent example of the same problem presented by the instant case is found in *Slotnick* v. *Staviskey,* 560 F.2d 31 (1st Cir. 1977). There, as here, plaintiff represented himself.

There were general allegations of a conspiracy but only one specific allegation, which the Court deemed insufficient.

The Court stated at page 33:

> "In an effort to control frivolous conspiracy suits under §1983, federal courts have come to insist that the complaint state with specificity the facts that, in the plaintiff's mind, show the existence and scope of the alleged conspiracy. It has long been the law in this and other circuits that complaints cannot survive a motion to dismiss if they contain conclusory allegations of conspiracy but do not support their claims with references to material facts." (Citations omitted)

In the case at bar, petitioner states six specific allegations purporting to show fraud or conspiracy involving

respondent Lahman. All but one occurred in open court consisting of arguments made by Lahman or his conduct. Typical is the allegation that petitioner saw Lahman in Judge Cook's chamber hallway before each hearing. There is certainly nothing sinister about a lawyer being outside a judge's chambers before a hearing or even in speaking to the judge. This allegation does not even rise to the dignity of an allegation of conspiracy. The conduct outside the courtroom involves the allegation that Lahman was guilty of fraud because he mailed petitioner an instrument showing a date of service with a postmark three days later and received by petitioner the following day. No attempt is made to show that there was any improper conduct on the part of Lahman or that any prejudice resulted to anyone.

The conclusion is inescapable that the petitioner failed to make specific allegations of conspiracy.

Petitioner also alleges a violation of his civil rights under the provisions of 42 U.S.C. 1985 and 1986. As stated by the Court of Appeals in *Shaffer* v. *Cook,* supra, these claims were properly dismissed because of petitioner's failure to allege any "invidiously discriminatory motivation" on the part of respondents.

CONCLUSION

WHEREFORE, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent
Larry D. Lahman

April, 1981

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Response of Respondent Larry D. Lahman in Opposition to Petition for Writ of Certiorari were mailed to the persons listed below on the ..... day of April, 1981, by placing the same in the U. S. Mail with postage fully prepaid.

All parties required to be served have been served.

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